Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24 NCVC-2458–09 OF 2012
YEOH WEE SIAM J
29 JANUARY 2013

Insurance — Motor insurance — Policy of insurance — Road accident involving motorcycle covered by policy — Third party risks — Claim under policy — Duty of disclosure — Insurer applied for declaration that insurance was void and unenforceable — Whether insurer could avoid liability to third party for alleged accident — Road Transport Act 1987 s 96(3)

The second respondent's motorcycle ('the motorcycle') was insured under a motor insurance policy between the applicant insurance company and the second respondent. The insurance policy covered all riders and 'sesiapa yang menunggang di atas pemegang polisi atau dengan kebenarannya'. A road accident occurred involving the motorcycle, which the first respondent was riding. The accident had occurred when the first respondent had allegedly collided into another motorcycle, which one Amirul Azraai bin Aizu ('Amirul') was riding. Amirul commenced a civil action against the respondents claiming general and special damages that had resulted from the accident. The first respondent and Amirul had lodged their respective police reports regarding the accident. However, the first respondent had later lodged another police report (the second police report) wherein he stated that he was not involved in the accident with Amirul. In the second police report the first respondent claimed that he had only lodged the police report admitting his involvement in the accident so that Amirul could make an insurance claim for the injuries he had suffered. The applicant filed the present originating summons applying for a declaration that the insurance was void and unenforceable. Although the applicant, as insurer was statutorily bound by s 96(1) of the Road Transport Act 1987 ('the Act') to satisfy any judgment in respect of third party risks, it sought to rely on s 96(3) of the Act to avoid liability to a third party for the alleged accident.

Held, dismissing the application with costs to be borne by the applicant:

(1) There was no proof that the second respondent knew of the accident the first respondent was involved in to trigger off his obligation as the policy holder to make full and accurate disclosure of all facts he knew or ought to know (see para 13).

(2) Although the first respondent lodged a false police report on the accident

and was covered by the motor insurance policy, the fact remained that he did not have any privity of contract with the applicant (see para 14). A

(3) The applicant could not invoke s 96(3) of the Act, which provided that no sum would be payable by the insurer if he had obtained a declaration from the court that the insurance was void or enforceable 'before the date the liability was incurred'. In the present case the alleged accident involving the first respondent had already occurred and was now a past event. Thus, the applicant insurer was seeking a declaration from the court after the accident or after the date that the liability was incurred and not 'before' as provided in s 96(3). Therefore, it would not be in accordance with s 96(3) of the Act to grant a declaration that the insurance was void or enforceable (see para 16 & 17). B C

[Bahasa Malaysia summary

Motosikal responden kedua ('motosikal') diinsuranskan di bawah polisi insurans motor di antara pemohon dan responden kedua. Polisi insurans melingkupi kesemua penunggang dan 'sesiapa yang menunggang di atas pemegang polisi atau dengan kebenarannya'. Kemalangan jalan raya telah berlaku melibatkan motosikal, yang ditunggang oleh responden pertama. Kemalangan berlaku apabila responden pertama telah didakwa melanggar motosikal satu lagi, yang mana ditunggang oleh seorang yang bernama Amirul Azraai bin Aizu ('Amirul'). Amirul memulakan tindakan sivil terhadap responden-responden menuntut ganti rugi am dan khas yang disebabkan oleh kemalangan tersebut. Responden pertama dan Amirul telah membuat laporan polis masing-masing berkenaan kemalangan tersebut. Walau bagaimanapun, responden pertama kemudiannya membuat satu lagi laporan polis ('laporan polis kedua') di mana dia menyatakan bahawa dia tidak terlibat dalam kemalangan dengan Amirul. Dalam laporan polis kedua, responden pertama mendakwa bahawa dia hanya membuat laporan polis mengaku mengenai penglibatannya di dalam kemalangan supaya Amirul dapat membuat tuntutan insurans untuk kecederaan yang dialaminya. Pemohon memfailkan saman pemula ini memohon untuk perisytiharan bahawa insurans adalah tak sah dan tidak boleh dikuatkuasakan. Walaupun pemohon, sebagai syarikat insurans adalah terikat secara statutori oleh s 96(1) Akta Pengangkutan Jalan 1987 ('Akta') untuk memenuhi apa-apa penghakiman berkaitan risiko pihak ketiga, ia memohon untuk bergantung ke atas s 96(3) Akta untuk mengelak liabiliti kepada pihak ketiga bagi kemalangan yang didakwa tersebut. D E F G H

Diputuskan, menolak permohonan dengan kos ditanggung oleh pemohon: I

(1) Tidak terdapat bukti bahawa responden kedua mengetahui mengenai kemalangan tersebut kemalangan yang responden kedua terlibat untuk mencetuskan tanggungjawabnya sebagai pemegang polisi untuk membuat pendedahan penuh dan tepat kesemua fakta yang diketahuinya atau yang patut diketahuinya (lihat perenggan 13).

(2) Walaupun responden pertama membuat laporan polis yang palsu mengenai kemalangan tersebut dan dilindungi oleh polisi insurans motor tersebut, fakta kekal bahawa dia tidak mempunyai apa-apa priviti kontrak dengan pemohon (lihat perenggan 14).

(3) Pemohon tidak dapat membangkitkan s 96(3) Akta, yang memperuntukkan bahawa tiada jumlah akan dibayar oleh syarikat insurans jika dia mendapatkan perisytiharan daripada mahkamah yang insurans adalah batal atau boleh dikuatkuasakan 'before the date the liability was incurred'. Dalam kes ini kemalangan yang didakwa tersebut melibatkan responden pertama telah berlaku dan sekarang adalah kejadian lepas. Oleh itu, pemohon memohon perisytiharan daripada mahkamah selepas kemalangan atau selepas tarikh yang liabiliti tersebut ditanggung dan bukan 'before' seperti yang diperuntukkan dalam s 96(3). Oleh itu, ia tidak akan mengikut s 96(3) Akta untuk memberikan perisytiharan bahawa insurans adalah terbatal atau boleh dikuatkuasakan (lihat perenggan 16 & 17).]

Notes

For cases on policy of insurance, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 399–400.

Legislation referred to

Road Transport Act 1987 s 96(1), (3)

R Ratha (SG Lingam & Co) for the applicant.
The first and second respondents were absent.

Yeoh Wee Siam J:

[1] This is an appeal by the applicant against my decision made on 18 December 2012 regarding encl 1.

ENCLOSURE 1

[2] This is the originating summons filed by the applicant applying for the following declaratory orders:

1 Masa (jika perlu) dilanjutkan untuk memfailkan Saman Pemula ini;

2 Polisi No. D-3-11-H-011601 yang melindungi motorsikal No: DAY 3715 bagi tempoh 7.2.2011 hingga 6.2.2012 adalah tak sah (void) dan tidak boleh dikuatkuasakan (unenforceable) setakat perlindungan terhadap satu kemalangan yang berlaku pada 27.7.2011 yang melibatkan motorsikal No: WNX 5382 dan motorsikal No: DAY 3715;

3 Selanjutnya, Pemohon tidak bertanggungjawab untuk menanggung

sebarang perintah berikutan dengan tindakan Sivil di Mahkamah Sesyen Klang Saman No: 53-1778-12-2011;

4 Sebarang perintah atau arahan lanjutan yang dianggap sesuai dan manfaat oleh Mahkamah yang mulia ini; dan

5 Kos permohonan ini.

BRIEF FACTS

[3] The second respondent ('R2') is the registered owner of motorcycle No DAY 3715 ('the motorcycle').

[4] The applicant issued a motor insurance policy for the motorcycle for the period 7 February 2011–6 February 2011 through Policy No D-3-11-H-011601 ('the policy').

[5] A road accident occurred on 27 July 2011 ('the accident') involving the motorcycle which was ridden by the first respondent ('R1') and motorcycle No WNX 5382 which was ridden by Amirul Azraai bin Aizu ('Amirul').

[6] Messrs Karnes & Associates commenced a civil action in the Klang Sessions Court for Amirul against R1 and R2 claiming general and special damages resulting from the accident ('summons') ('the sessions court case'). according to the summons, R1 was the rider of the motorcycle and R2 is the registered owner of the motorcycle.

[7] Amirul and R1 respectively lodged their police reports on 15 August 2011 regarding the accident at the junction of Taman Feri Sabak Bernam.

[8] However, R1 had on 29 August 2012 lodged another police report stating:

(a) R1 and the motorcycle No DAY 3715 were not involved in the accident at all;

(b) Amirul's father ie Sergeant Azizu had requested R1 to assist by making a police report admitting to R1's involvement in the accident so that an insurance claim can be made for Amirul's injuries; and

(c) R1 agreed to assist because Sergeant Azizu is his superior officer at Batalion 3, Askar Wataniah.

[9] R1 is also cited as a party in this originating summons by the applicant because R1 is 'covered' under the insurance policy. The policy is responsible for

'all riders' and 'sesiapa yang menunggang di atas arahan Pemegang Polisi atau dengan kebenarannya' (exh SK5 of *affidavit lanjutan*).

[10] Both the respondents were absent from court on the hearing date even though they were respectively served with the originating summons (see affidavits of service in encls 3 and 5). No affidavit in reply was filed by the respondents.

COURT'S DECISION ON ENCL 1

[11] The application is dismissed. Costs are to be borne by the applicant.

GROUNDS FOR THE COURT'S DECISION

[12] The applicant contended that R1 and R2 ('the respondents') are bound by the principle of *uberimma fide*s (utmost good faith) to the applicant where the respondents are required to give full and accurate disclosure to the applicant regarding all the obligations and rights which may cause the applicant to be liable under the insurance contract between the applicant and R2 for the motorcycle. Counsel for the applicant cited the 'Important Notice' contained in the insurance certificate (exh Sk6 of *affidavit lanjutan*) which states:

> (5) Duty of Disclosure - If you fail to disclose to us fully and faithfully all the facts which you know or ought to know, or if you misrepresented any facts to us before the policy was entered into, we may avoid this policy.

[13] There is no proof that R2 knew of the accident which R1 was involved in to trigger off the above obligation of R2, the policy holder, under para (5) above to disclose fully and faithfully all the facts which R2 knows or ought to know.

[14] It is true that R1 lodged a false police report on the accident. However, even though R1 was covered by the insurance policy taken by R2, the fact remains that R1 does not have any privity of contract with the applicant or the insurance company/insurer. The insurance contract or the policy was executed between R2 and the applicant, and R1 is not a party to it.

[15] Section 96(1) of the Road Transport Act 1987 ('the RTA') provides for the duty of insurers to satisfy judgments against persons insured in respect of third party risks. The applicant, as insurer, is statutorily bound by this provision to satisfy any judgment in respect of third party risks.

[16] However, the applicant sought to rely on s 96(3) of the RTA which provides:

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:.

[17] In my opinion, s 96(3) of the RTA cannot be invoked by the applicant because no sum shall be payable by an insurer under s 96(1) of the same Act 'if before the date the liability was incurred', the insurer had obtained a declaration from the court that that insurance was void or unenforceable. The alleged accident involving R1 has already occurred and it is now a past event. The applicant insurer is seeking a declaration from the court after the alleged accident ie after the date that the liability was incurred, and not 'before' as provided in s 96(3) of the RTA. Therefore, it would not be in accordance with s 96(3) of the RTA for this court to grant a declaration that the insurance was void or unenforceable.

[18] In any case, the sessions court case was withdrawn by Messrs Karnes & Associates on 15 October 2012. In view of that, this matter has been rendered academic ie regarding the applicant's possible liability to a third party for the alleged accident.

[19] Based on the above considerations, I order accordingly.

Aplication dismissed with costs to be borne by applicant.

Reported by Kohila Nesan